IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE SIDE

CRIMINAL REVN.APPLICATION NO.63 OF 1997

M. Abosali (Abosaleh) Malbari ..Applicant

Versus

Abbas Mohd. Malbari and Anr. ..Respondents

Mr. B.G.Tangsali for applicant

Mr. Rajesh More, APP for State

Mr. Girish Agarwal h/f Mr. R.M.Agarwal for Respondent no.2

CORAM : S.C.DHARMADHIKARI,J.

DATE : 7TH NOVEMBER, 2006

P.C.:

1. The applicant is aggrieved by an order passed by the learned Addl. Sessions Judge, Thane on 30th December, 1996.

2. An appeal being Cri. Appeal No.43 of 1991 was preferred by one Abbas Mohammad Malbari and another

challenging the judgment and order passed by trial court convicting and sentencing them to suffer Simple Imprisonment for six months and fine of Rs.1000/= each. The offences are punishable under Sections 7(1) read with Section 16(1)(a) of Prevention of Food Adulteration Act, 1954. The statement of the applicant before the lower appellate court was that the appellants are his brothers and they were carrying on business in the name and style "New Madina Hotel" at Bhivandi. The Municipal Licence stands in the name of the applicant but the brothers were running and managing the business since 1973. The applicant was residing all through out in Saudi Arabia. While conducting the business it appears that violation of the Prevention of Food Adulteration Act 1954 was alleged and a criminal case was filed against the brothers of the applicant being Criminal Case No.616 of 1987. The applicant submitted that the adulterated article i.e Groundnut Oil was being sold is the charge levelled by the Food Inspector. The Applicant was shown as an accused in this criminal case. Thus, he as also his brothers were prosecuted. The case proceeded and all through out one of the brothers represented before the trial court himself to be the applicant and that is how the case ended in conviction and sentence.

3. The brothers preferred a criminal appeal being Criminal Appeal No.43 of 1991 to challenge the order of conviction and sentence imposed by the trial court but both appellants (brothers of the applicant) expired during the pendency of the same.

4. An application was preferred by the present applicant in the said appeal pointing out the aforesaid facts and in effect seeking de-novo trial. He pleaded that he was all through out not residing in India and the person appearing before the trial court was his brother. The applicant was never given any opportunity to defend himself during the course of trial.

5. The application was placed before the Appellate court and it passed the impugned order rejecting it. The lower appellate court directed that the appeal will proceed as it is. That order of the lower appellate court is subject matter of challenge in this revision application.

6. Mr. Tangsali, learned advocate for the applicant submits that the order under challenge has resulted in

miscarriage of justice in as much as the applicant who is an accused in a criminal case after being denied an opportunity to defend himself has lost further opportunity to challenge the conviction and sentence in appeal. Original Appellants are his brothers who have expired. However, even now if an opportunity is given to the applicant to prosecute the appeal, he would be able to substantiate his pleas and seek the relief of de-novo trial and/or such other relief as permissible in law.

7. During the course of his submissions, I pointed out to Shri Tangsali that the applicant is intending to prosecute an appeal which has already abated on account of death of the appellants-original accused. Thus, in an appeal which is already disposed of as abated the present application is preferred. That apart, the present applicant has not filed any appeal before the lower appellate court independently to challenge the judgement of the trial court convicting and sentencing him as above. Mr. Tangsali is unable to point out to me any provision which enables the Applicant to prosecute an Appeal which is filed by the other accused and after the same has abated upon his death. In such circumstances, in my opinion, no useful purpose will be served by entertaining

the plea of the applicant before me. The revision applicant is by an Accused in a criminal case. He has come to this court aggrieved by the rejection of application made by him in an appeal which was preferred by the other accused and who are no more. He has not filed an appeal independently admittedly. Therefore, at his instance the pending appeal which has already abated cannot be revived nor any relief can be granted to him in this application.

8. The purpose of the present application appears to be to some how obtain an order of setting aside the conviction and sentence as the same might be affecting the Applicant in obtaining a licence to run the Hotel business. In my view, nothing prevents the applicant to apply for a licence under the relevant law for administering and managing so also conducting hotel business. If such an application is made, the authority is bound to consider the same in the light of the prevailing laws and it would always be open for the applicant if he is aggrieved by denial of licence to initiate such proceedings as are permissible in law. In such proceedings, it will be always open for him to rely on the above aspects and even otherwise point out that the

order of conviction and sentence is no bar while considering his application for issuing a licence. All such contentions can always be raised irrespective of rejection of this criminal revision application. Keeping them open, the present application is dismissed.

9. Rule is discharged.

10. At this stage Mr. Tangsali invites my attention to an order passed by this Court on 9.4.1997. This court has directed respondent nos.2 and 3 to investigate the matter and in case any offences are disclosed against the applicant to proceed against him in accordance with law.

11. If the investigation is over and respondent nos.2 and 3 have not launched any prosecution or registered any offence against the present applicant then needless to state that all such documents as are seized during the course of investigation shall be returned to the applicant.

(S.C.Dharmadhikari, J.)